

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

NO. 77-4019

**UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT**

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LOCAL 259, UNITED AUTOMOBILE, AEROSPACE, AND
AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Respondent.

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ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

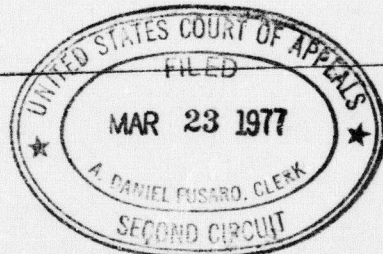
BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding that the Union violated Section 8(b)(1)(B) of the Act by restraining and coercing the Company in the selection of Anthony Dazzo as its representative for the adjustment of grievances.

STATEMENT OF THE CASE

This case is before the Court upon application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. Section 151, et seq.), for enforcement of its order issued against Local 259, United

Automobile, Aerospace, and Agricultural Implement Workers of America (hereinafter referred to as "the Union"), on June 30, 1976. The Board's Decision and Order are reported at 225 NLRB No. 55. This Court has jurisdiction of the proceedings, the unfair labor practices having occurred in West Islip, New York, within this judicial circuit. No jurisdictional issue is presented.

I. The Board's Findings of Fact

The Board found that the Union violated Section 8(b)(1)(B) of the Act by demanding that Atherton Cadillac, Inc., (hereinafter referred to as "the Company") discharge General Manager Anthony Dazzo and by conditioning the grant of concessions in bargaining upon compliance with said demand (A. 15-24)^{1/}. The evidence on which the Board based its findings is summarized below.

The Company, a New York corporation, sells and services Cadillac automobiles (A.3). Anthony Dazzo went to work for the Company as a mechanic in 1965 and, after a series of promotions, was appointed General Service Manager in 1971 or 1972 (A. 4; 81-82). Dazzo's duties as General Manager included overall supervision of the service department and the employees who worked there; hiring, disciplining and firing employees; scheduling work; and adjusting grievances (A.5; 82-83,85-90).

One week prior to a representation election held on January 17, 1975,^{2/} at which the Union prevailed, Dazzo laid off several employees, including a member of the Union's organizing committee, announced that there would

^{1/} "A." references are to the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

^{2/} Unless otherwise indicated, all subsequent dates refer to 1975.

be further layoffs the following week, and stated that he intended to reduce an employee's wages (A.5; 38, 98, 101, 47-48, 144, 153, 156, 159). About January 20, Union secretary Louis Salvatore and Union representative Steven Elliot asked Dazzo to recall the employees he had laid off before the election (A. 5-6, 39-40, 128). When Dazzo refused, Salvatore remarked that "this [was] a declaration of war" (A. 20, 6; 42).

The following day, Salvatore and Elliot asked Company President Atherton, Sr. to recall the laid off employees, expressing the view that there was no justification for the layoff. Atherton, Sr. disagreed, saying that the business was suffering losses, and told Salvatore and Elliot that Dazzo was in charge of the shop (A. 6; 44). Salvatore responded, "Mr. Dazzo is creating trouble" (A. 20, 6; 45).

Several days later, employee Robert McDonald noticed that a prospective customer was refused service and told that the service department was booked up, even though mechanics were idle (A. 6; 145-146). McDonald reported this to the service department employees who, on their initiative, engaged in a 2-hour work slowdown to protest the turning away of work, which they believed had been ordered by Dazzo (A. 6; 46, 49, 51, 146).

The next day, Richard Atherton, Jr., the Company's Vice President, came into the shop to find the reason for the slowdown (A. 6; 147-148). He asked McDonald and Edward Zegilla, another member of the organizing and bargaining committees, what the problem was (A. 6; 148). McDonald told Atherton that "the problem is Dazzo; lighten Dazzo up, he is harassing and threatening the men; Dazzo [is] turning away work; and . . . the men [are] upset by the proposed layoffs" (A. 20, 6; 52-53, 78, 159-160, 164). When Atherton, Jr. asked

McDonald and Zegilla whether they had any recommendations for a new service manager, they suggested Ernie Barter, a service writer, for the job (A. 6; 164)^{3/}.

In the meantime, on January 22, Union representative Elliot met with the Company's service department employees for the purpose of formulating the Union's bargaining proposals prior to the beginning of bargaining. A strike deadline of March 1 was agreed upon (A. 17; 47).

The first negotiating session took place on February 3, when the Union set forth its initial proposal^{4/} and requested that the laid off employees be recalled. (A. 7-8; 51-52). The Union did not modify any of its proposals until the last bargaining session. Union Secretary Salvatore explained at one of the bargaining sessions why the Union refused to change its proposals. He said that the Company's "manager is making things tough, harassing the committee, this is why the men are not being flexible, and why they want the contract terms that have been proposed" (A. 17, 8; 54-55, 133).

At the commencement of the February 27th negotiating session, the Union again informed Company President Richard Atherton, Sr. and Company attorney Lewis Stone that the Union was still not inclined to make changes in its proposals. Company attorney Stone then asked the Union's negotiators to leave the room and adjourned the session for a half-hour (A. 8; 70-71, 130). When bargaining resumed, Stone announced that Dazzo had been discharged, and

^{3/} Barter became service manager after Dazzo's discharge (A. 172).

^{4/} The Union's initial proposal included a wage increase for the mechanics from \$6.00 to \$7.50 per hour, an increase in the incentive rate for polishers, two additional holidays and plans for vacations, sick leave and pensions (A. 7-8; 51-52).

further stated "we feel that is the problem and we are going to get rid of the problem forever" (A. 18, 7; 165, 130-131).^{5/}

According to Dazzo, he was told by Atherton, Sr., that "Union agents . . . demanded that [he] be terminated; [that] they wouldn't negotiate a contract; [and that] if [he] wasn't off the premises that day they would strike." (A. 18; 104). Also according to Dazzo, he received a letter of reference on Company stationery signed by Company President Atherton, Sr., which states that a "Union dispute arose and to avoid a strike, Mr. Dazzo became the focal point of the dispute that made it necessary to relieve Mr. Dazzo of his duties." (A. 19, 9; 26).

On the evening of February 27, the service department employees met with Union secretary and bargaining spokesman Louis Salvatore and the Union's negotiating committee (A. 9; 131). The employees, who had previously expressed their dissatisfaction with the slow process of negotiations and with conditions in the shop caused by Dazzo, and who had previously stated they could not work with Dazzo, urged the Union negotiators to lower their bargaining proposals, negotiate past the strike deadline and settle the contract as quickly as possible, because the biggest problem,

^{5/} The exact date of Dazzo's discharge is not clear from the record herein. Dazzo testified that he was discharged on February 11 (A. 82). The Union, however, asserted that he was fired on February 27th (A. 7), a date which seemed "more likely...in view of the sequence of events" to the Administrative Law Judge (A. 8). The Board found it unnecessary to resolve this factual dispute until the compliance stage of this proceeding (A. 18, n.2).

Dazzo, was gone (A. 9; 131, 167-169).^{6/} Accordingly, at the next bargaining session on March 3rd, the Union reduced its wage increase and incentive proposals, and with these modifications, the Company accepted all of the Union's other proposals and the parties entered into a contract (A. 20, n. 4, 10; 35, 58-59, 131).

II. The Board's Conclusions and Order

On the basis of the foregoing facts, the Board, in disagreement with the Administrative Law Judge,^{7/} concluded that the Union had violated Section 8(b)(1)(B) of the Act by demanding that the Company discharge Anthony Dazzo, and by conditioning the grant of concessions in bargaining upon compliance

^{6/} During the period of negotiations, the Union continued to meet with Company employees (A. 20; 56). At these meetings, the employees expressed dissatisfaction with shop conditions stemming from dissatisfaction with Anthony Dazzo; they indicated they would not "work with" Dazzo (A. 20; 55-57). Union bargaining committee member Walter Sitler said talk of Dazzo's possible termination was "constant" throughout the negotiation period, even though it was never actually discussed at the bargaining table (A. 124).

^{7/} The fact that the Board disagreed with the Administrative Law Judge's ultimate conclusions affords no basis for rejecting the Board's findings, since the Board drew different inferences and conclusions from the same evidence. While the Administrative Law Judge found that the evidence "creates at most only a suspicion that it was respondent's purpose to cause [Dazzo's] discharge" (A. 12), the Board found that the same evidence, "although circumstantial, is sufficient to establish a violation herein". (A. 19). This clearly is a case "where the presumptively broader gauge and experience of members of the Board have a meaningful role." Oil, Chemical & Atomic Workers International Union, Local 4-243, etc. v. N.L.R.B., 362 F.2d 943, 946 (C.A.D.C., 1966). The Judge's ultimate legal conclusions therefore, are not entitled to any special weight. See N.L.R.B. v. A.P.W. Products, Inc., 316 F.2d 899, 903-904 (C.A. 2, 1963); Sign and Pictorial Union Local 1175, etc. v. N.L.R.B., 419 F.2d 726, 733-734 (C.A.D.C., 1969).

with said demand. The Board ordered the Union to cease and desist from restraining or coercing the Company or any other employer in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances. Affirmatively, the Board ordered the Union to send Anthony Dazzo a written notice, with a copy to the Company, stating that it has no objection to his employment or selection as a representative for the purposes of collective bargaining or the adjustment of grievances by the Company and that it will not question his reemployment or reinstatement; to make Dazzo whole for any loss of earnings suffered by reason of its unlawful conduct; and to post the appropriate notices (A. 23).

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE UNION VIOLATED SECTION 8(b)(1)(B) BY DEMANDING THE DISCHARGE OF ANTHONY DAZZO AND BY CONDITIONING THE GRANT OF CONCESSIONS IN BARGAINING UPON SAID DEMAND.

Section 8(b)(1)(B) of the Act provides that it shall be an unfair labor practice for a labor organization or its agents "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." This provision, which corresponds to Section 7 of the Act guaranteeing employees the right "to bargain collectively through representatives of their own choosing," enables employers "to choose whomever they wish to represent them in formal labor negotiations [and] is fundamental to the statutory scheme." General Electric Company v. N.L.R.B., 412 F.2d 512, 516 (C.A. 2, 1969). The statutory language and the legislative history make it clear that Section 8(b)(1)(B) bars a labor organization from bringing pressure on an employer in an attempt to dictate the

selection of supervisors vested with collective bargaining and grievance adjustment authority.^{8/} Florida Power & Light Co. v. IBEW, Local 641, 417 U.S. 790, 798-799 (1974) and cases cited therein; International Typographical Union Local 38 v. N.L.R.B., 278 F.2d 6, 11-12 (C.A. 1, 1960), affirmed by an equally divided court, 365 U.S. 705, 707 (1961).

As this Court has held, Section 8(b)(1)(B) of the Act plainly is violated where a union directly pressures an employer to replace one of his chosen representatives for bargaining or grievance handling. See, e.g., N.L.R.B. v. Local 964, United Brotherhood of Carpenters, 447 F.2d 643, 644-645 (C.A. 2, 1971)(threats of trouble and refusal to supply workers unless employer changed bargaining representative); Local 294, Teamsters, etc., 126 NLRB 1, 4 (1960), enforced, 284 F.2d 893, 896 (C.A. 2, 1960) (union refusal to participate in the administration of contract unless the employer withdrew certain representatives). Applying these principles, the Board properly found that the Union's demand for Dazzo's discharge and conditioning of bargaining concessions thereon coerced and restrained the Company in the selection of its representative for purposes of grievance adjustment.

8/ As the Senate Report explained:

"[A] union or its responsible agents could not, without violating the law, coerce an employer into joining or resigning from an employer association which negotiates labor contracts on behalf of its members; also, this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances."

As shown in the Statement, there is no real dispute that General Manager Anthony Dazzo was a supervisor who possessed and exercised the power of grievance adjustment. The record shows that Dazzo was responsible for the overall supervision of the Company's service department employees, and that his duties included discussing and settling grievances with the shop steward, as well, of course, as hiring, firing and disciplining employees, scheduling work and overseeing the quality of the work performed. On the basis of these facts, the Board, in agreement with the Administrative Law Judge, concluded that Dazzo was a representative of the Company for the adjustment of grievances. Consequently, if Dazzo was discharged because of the Union's pressure, his discharge constituted a violation of Section 8(b)(1)(B) of the Act.

As the Board found (A. 20), the record reveals "an extensive pattern of statements and conduct through which [the Union] conveyed a clear message to the [Company] to discharge Dazzo." Initially, after an argument concerning the layoffs for which Dazzo was responsible, Union representative Salvatore "declared war" on Dazzo on January 20 and, shortly thereafter, protested to Company President Atherton, Sr. that Dazzo was "creating trouble" (A. 16, 20; 42, 45). When Company Vice President Richard Atherton, Jr. went to the shop a few days later to find out the cause of the employee slow-down, Union committee-man McDonald, confirmed that Dazzo was "the problem", and even suggested a replacement for him (A. 20; 52-53, 164). Finally, at a mid-February bargaining session, Salvatore indicated that the Union's inflexibility with regard to bargaining strategy and proposals was because of Dazzo. As the Board properly found (A. 20), the Union's "message to fire Dazzo and its hostility toward Dazzo were repeatedly communicated to the [Company]."

Moreover, the events surrounding Dazzo's actual discharge further show that the Union's motive was to secure that discharge. The Company discharged Dazzo only after it was clear that negotiations were hopelessly stymied and, as the Union specifically stated in mid-February, stymied because of Dazzo. The manner in which the termination was accomplished, during a half-hour hiatus in negotiations, and the way in which it was announced as "going to get rid of the problem forever," further evidence the fact that in firing Dazzo, the Company was giving in to the Union's pressure. Dazzo, a ten-year veteran employee who had risen to General Manager, was clearly someone not to be discharged lightly. And Dazzo testified that Company President Atherton, Sr. told him shortly after his discharge that the Union had demanded his discharge and that the Company had capitulated in order to avoid a strike.^{9/}

^{9/} Although Dazzo's testimony and letter regarding the circumstances of his discharge are hearsay evidence insofar as Union conduct is concerned, such evidence, when corroborated or uncontradicted, may be given probative weight. See N.L.R.B. v. I.U.O.E., Local 12, 413 F.2d 705, 707 (C.A. 9, 1969); N.L.R.B. v. Imparato Stevedoring Corporation, 250 F.2d 297, 302-303 (C.A. 3, 1957); Colony Kitchens Inc., 217 NLRB 671, 672 n. 6 (1975).

No adverse inference is raised by the fact that Company President Atherton, Sr. was not called to testify regarding Dazzo's discharge. Atherton, Sr. was not a witness under the control of the General Counsel, and was "equally available to both parties" (A. 19, n. 3). As a result, the Board correctly concluded that no adverse inference is raised by his failure to testify for the General Counsel, for it is only when a witness is under the control of one party that an inference may be drawn from a failure to call such witness. See e.g., Interstate Circuit Inc. v. United States, 306 U.S. 208, 225-226 (1939); N.L.R.B. v. A.P.W. Products Co., supra, 316 F.2d at 903; N.L.R.B. v. Drennon Ford Products Co., 272 F.2d 23, 27 (C.A. 5, 1959).

Furthermore, the Union's reactions to the news of Dazzo's discharge provide additional evidence of unlawful motive. Indeed, the Board found "particularly significant" (A. 20) the fact that shortly after the discharge of Dazzo, the Union suddenly changed its intransigent stance, substantially lowered its bargaining demands, and agreed to negotiate past the March 1st strike deadline. At the meeting on February 27 the employees, who had previously protested the shop conditions for which Dazzo was supposedly responsible, and who had said they could not work with Dazzo, told Union secretary Salvatore to try and conclude negotiations, to modify the Union's bargaining proposals and to reason with management since Dazzo, their biggest problem, was gone (A. 20; 131, 168-169). It is clear, as the Company correctly surmised, that Dazzo was the hitch in successful bargaining and his discharge was required in order for the Union to change its bargaining stance.

It is anticipated that the Union will attempt to defend its conduct by relying on the fact that there was no direct record evidence that the Union sought Dazzo's discharge or conditioned bargaining concessions on that discharge. However, this defense must fail. The Board admittedly relied wholly (A. 19) on circumstantial evidence to find a violation here, as it was entitled to do.^{10/} Thus, the lack of direct evidence that the Union expressly demanded Dazzo's discharge, which lack the Board noted (A. 17), is of no moment.

^{10/} It has long been established that unfair labor practice violations may be proved by circumstantial evidence, since "[i]t would indeed be a rare case where the finders of fact could probe the precise factors of motivation. . . ." N.L.R.B. v. Link-Belt Co., 311 U.S. 584, 602 (1941). Accord: N.L.R.B. v. Jan Power, Inc., 421 F.2d 1058, 1063 (C.A. 9, 1970).

The Board carefully detailed (A. 20) the evidence on which it relied to establish the Union's demand for Dazzo's discharge, including the Union's admission that no bargaining concessions were made because of Dazzo's continued employment.

When the Company gave in to the Union's pressure and discharged Dazzo, the results were immediate. Not only did bargaining become easier, but within days a contract was agreed upon and executed. It was Dazzo's discharge alone which caused the employees to instruct the Union to modify its proposal and wrap up the contract because they had achieved what they wanted; "the biggest problem, Dazzo, was gone" (A. 58). In all these circumstances, the Board properly found that the Union violated Section 8(b)(1)(B) of the Act by engaging in a course of conduct during negotiations by which it restrained and coerced the Company in its selection of Dazzo as its representative for the adjustment of grievances. See N.L.R.B. v. Local 964, Carpenters, supra, 447 F.2d at 645.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Board's order be enforced in full.

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No. 77-4019

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies each of the brief and appendix in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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Dated at Washington, D. C.

this 18th day of March, 1977.